In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS,
v.
BYRON BARLOW, JAMES E. BLACKWELL, and James M. Dougan, partners, as Byron Barlow & Co. — No. 127.

BYRON BARLOW, JAMES E. BLACKWELL, and James M. Dougan, partners, as Byron Barlow & Co., appellants,
v.
THE UNITED STATES. — No. 128.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

Appellants in case No. 127.
Appellees in case No. 128.

STATEMENT.

These are cross appeals from judgments of the Court of Claims growing out of a certain contract in writing for the construction of a dry dock at Port Orchard, Wash., and also for compensation for expenses incurred and loss of time in and about the experimentation with a certain system of pile driving known as

the "water-jet" system, under verbal authorization and direction of the Secretary of the Navy during the progress of the construction of the dock. The action upon the written contract for the construction of the dock is for alleged breach of contract on the part of the United States in requiring the contractors to furnish a different and better sandstone for the ashlar of said dock than that required by the contract, as construed by the appellees, and for requiring the contractors to perform other work and supply other materials which the contractors claim were not required by the terms of the written contract. This action was brought by voluntary petition under the original jurisdiction of the Court of Claims. (Transcript, p. 8.)

The second cause of action was referred to the Court of Claims by the Secretary of the Navy under the provisions of section 2 of the act of March 3, 1883 (22 Stats., 485), commonly called the Bowman Act. The two causes were consolidated and were heard together (transcript, p. 15), resulting in a judgment for the claimants in the sum of $24,942.99 upon the findings of the court Nos. VII, IX, XI, and XII, and a judgment in favor of the United States upon the findings of the court Nos. VIII and X. From the judgments thus rendered in favor of the claimants the United States have appealed, and from the judgments rendered in favor of the United States the claimants have appealed.

Inasmuch as the nature of this case will necessitate its consideration by items, in which the facts relating to each item will necessarily have to be set forth in full, a detailed statement of the facts is omitted at this

point in the interests of perspicuity and in order to prevent repetition.

ASSIGNMENTS OF ERROR.

In case No. 127.

The court below erred:

1. In holding that the contract in the case at bar authorized the civil engineer in charge of the construction of the dry dock to designate the sandstone to be used in the ashlar of said dry dock, and in holding that his decision upon this issue was final.

2. In holding that the chief of the Bureau of Yards and Docks was not, subject to the right of appeal to the Secretary of the Navy, the proper person to designate the character of sandstone to be used in the ashlar of said dry dock, under the provisions of the contract at bar, and that his decision on said issue was not, in the absence of appeal to the Secretary, final.

3. In holding that the character of sandstone to be used in the ashlar of said dry dock was not such a "doubt or dispute" as to the meaning or requirement of the contract at bar as to necessitate a reference to the ultimate and final decision of the chief of the Bureau of Yards and Docks, subject to appeal to the Secretary of the Navy, whose decision should be binding upon both parties to the contract, as was required by the provisions of section 14 of said contract.

4. In holding that the provisions of section 14 of the contract at bar were void and of no effect, and in refusing to enforce the provisions of said section 14 according to its terms.

5. In entertaining jurisdiction over the cause of action disclosed in Findings VI, VII, XI, and XII.

6. In rendering judgment against the United States in the sum of $5,494.45 for the amount of Tenino sandstone quarried, cut, and delivered and quarried, cut, but undelivered under the facts disclosed in Finding VII.

7. In holding that the concrete toe described in Finding IX was not required to be put in by the terms of the contract at bar and in rendering judgment in favor of the claimants and against the United States for the cost thereof.

8. In holding that the change in the method of driving the foundation piles from the drop-hammer process as required by the contract to the water-jet process as verbally authorized and directed by the Secretary of the Navy and as described in Finding XI created any valid contract or assumpsit on the part of the United States to pay such increased cost, and in rendering judgment against the United States for expenses incurred by said change of method and for the delays incident thereto, as set forth in the courts' Findings Nos. XI and XII.

9. In holding that the Secretary of the Navy had any lawful right or authority to depart from the terms of the written contract at bar by verbal orders or directions.

10. In failing and refusing to enforce the provisions of the seventh paragraph of the contract at bar in accordance with its terms.

11. In rendering judgment against the United States and in favor of the claimants in any sum whatsoever upon the facts set forth in the findings.

BRIEF.

I.

CHANGE OF SANDSTONE.

The engineer in charge, under the provisions of the contract at bar, is not given authority to finally decide any question, doubt, or dispute arising under the contract. He is given a limited authority to approve certain material and work, subject to the requirements of the contract as to the quality of that material or work, and always subject to the revisory power of the Chief of the Bureau of Yards and Docks. The intention of the contract, as abundantly disclosed by the whole instrument, was that the Chief of the Bureau of Yards and Docks was to decide all questions arising during the performance of the work, and that he was to be the referee of all disputes or doubts, subject to an appeal to the Secretary of the Navy, whose decision was to be final and conclusive upon all parties. As they contracted so they performed. The character of the sandstone to be used in the ashlar was referred to the Secretary of the Navy by the claimants for his decision, and after full hearing was decided against them. This decision being unimpeached for fraud or mistake, is conclusive, and ousts the jurisdiction of the court over the original cause of action.

An examination of the contract at bar discloses that the person selected to determine the questions of material, workmanship, and all other doubts or disputes arising during the performance of the work was, in the first instance, the Chief of the Bureau of Yards and Docks, whose decision upon every such material was to be final and binding upon both parties, unless an appeal from his decision was taken to the Secretary of the Navy, in which event all the facts were to be laid before that officer and the reasons of either party presented in writing for his consideration and determination, and when so considered and determined it was to be final and conclusive upon both parties to the contract. The engineer is nowhere given authority in this contract to finally pass upon any question of its construction, or any question as to the character of materials to be used in the dock, or upon any matter whatsoever. He is given, in one or two places in the contract, authority to approve or disapprove of materials or workmanship, but his approval or disapproval is not made a finality either in terms or by implication. On the contrary, it is stipulated both by expression and by necessary implication that such approval or disapproval is subject to the revision of the Chief of the Bureau of Yards and Docks, whose decision upon the question shall be final unless an appeal be taken to the Secretary of the Navy, in which event the decision of that officer is to be a finality.

In the first place, the court will observe that this contract is entered into by the Chief of the Bureau of Yards and Docks, who is the party of the second part.

In the first paragraph of the contract it is provided (Transcript, p. 16) that the contractors—

> will at their own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description—*all of which shall be of the best kind and quality adapted for the work * * * subject to the approval of the civil engineer or such other competent officer or person or persons as may for that purpose be designated by the party of the second part.*

In the eighth paragraph of the contract it is provided:

> The aforesaid dry dock and its accessories and appurtenances and each and every part thereof shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans and specifications *to the satisfaction of the party of the second part* [i. e., the Chief of the Bureau of Yards and Docks, who is the party of the second part].

Further on in this paragraph of the contract it is provided that—

> In case any question shall arise under this contract concerning penalties, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to this contract. (Transcript, p. 19.)

In the eleventh paragraph of the contract it is provided that under certain circumstances the contractors

may be entitled to such additional time for the commencement or completion of the work as in the judgment of the Secretary of the Navy shall be just and reasonable.

Paragraph 14 of the contract is as follows (Transcript, pp. 21, 22):

> It is expressly understood, covenanted, and agreed by and between the parties to this contract that if any doubts or disputes as to the meaning or requirements of anything in this contract, or if any discrepancies appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the consideration and determination of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractors to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractors with a full and complete statement of the grounds of their appeal in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require; and the parties of the first part hereby bind themselves and their heirs and assigns and their personal and legal representatives to abide by his, the said Secretary's, decision in the premises.

Turning now to the specifications attached to and forming a part of the contract we find the following applicable to the issue now under consideration.

Under the head of "Intention" (Transcript, pp. 22, 23) we find it provided that—

> It is the declared intention and meaning of the contract to obtain, complete, a substantial dry dock, according to the general plans and specifications, to the entire satisfaction of the Bureau of Yards and Docks. Should there be any omissions in the plans or specifications of any work or material required to secure this result, such work or material is to be regarded as embraced in the plans and specifications and to form a part of the contract.

Under the general heading of "Stone masonry" (Transcript, p. 30) it is provided that—

> The ashlar must be of granite or sandstone, of quality approved by the engineer. All stones must be hard, clean, and free from seams and imperfections and of good bed and build. They must be laid true on their natural beds, and without pinning.

The contention of the claimants in this case and the judgment of the court below is solely founded upon this last-quoted provision of the specifications, and in total disregard of every other provision of the contract and specifications. The contention was made below and concurred in by the Court of Claims that, when a certain sandstone, known as Tenino sandstone, was submitted by the contractors to Mr. White, the Government engineer, who at that time had been appointed to supervise the construction of the dock, and was by him accepted for use in the ashlar of this dock,

his acceptance thereof was binding upon the United States, and that the sandstone so accepted by the said White must be used by the Government in the construction of this dock whether the same was suitable or unsuitable, fit or unfit, hard or soft, free from imperfections or not, because, forsooth, it had been accepted by the Government's engineer. Not only does this construction of this paragraph of the specifications totally ignore and set at naught every other express provision of the contract and specifications, as well as the whole spirit and intent of this instrument as gathered from its entirety, but likewise interpolates into the provision under consideration words which it does not contain and also ignores provisions which it does contain. The paragraph of the specifications under consideration provides that the ashlar is to be of granite or sandstone of quality approved by the engineer, but it does not say either in this provision or in any other provision of the contract or specifications that his approval is to be final. Not only so, but the paragraph under consideration contains limitations in the nature of a condition precedent upon which the engineer in charge is permitted to approve at all, to wit, the condition that "all stones must be hard, clean, and free from seams and imperfections, and of good bed and build." Manifestly, therefore, if the engineer in charge, either through ignorance or corrupt motives or from any other cause, shall accept sandstone for this ashlar which was not hard nor clean, nor free from seams or imperfections, nor of good bed and build,

his attempted approval of such material would be a complete nullity. The whole paragraph is to be taken together, and before the engineer in charge is given any authority whatsoever to approve this material the material must come up to the standard prescribed in this paragraph of the specifications. Now, who is to determine whether the stone approved by the engineer is a hard, clean, or faultless stone? This paragraph does not inform us, but when we turn to paragraph 14 of the contract, it is shown that the chief of the Bureau of Yards and Docks is the officer selected by the parties to the contract to settle this as well as all other doubts or disputes, subject to a right of appeal to the Secretary of the Navy, whose decision is to be final and conclusive upon all parties to the contract. After this stone had been accepted by Mr. White, and a small portion of the work upon the ashlar done, the attention of the chief of the Bureau of Yards and Docks was directed to the worthlessness and unsuitableness of this stone for the purpose for which it was being used, and immediately thereupon the chief of the Bureau of Yards and Docks caused thorough and exhaustive tests and analyses to be made of this Tenino sandstone, with the result that, to use the language of the finding of the court below (Finding VI, p. 41, 42):

> He reached the conclusion that said Tenino sandstone was not fit and suitable for the purpose for which it was proposed to use said stone; that said stone did not fulfill the requirements of the contract and the specifications as above recited; that it was not a hard stone,

> nor a clean stone, nor free from imperfections; that its absorbent qualities were too high; that its crushing strength was too low, and that it was in many essential particulars totally unfit and unsuitable and undesirable for the use in the ashlar of this dry dock.

The Chief of the Bureau of Yards and Docks having thus satisfied himself of the worthlessness of the stone proposed to be used, notified the contractors that the Tenino sandstone would not be received, and that they must furnish a sandstone which would come up to the requirements of the specifications.

At this point of the controversy the contractors, if they did not propose to live up to their covenant that this dispute should be submitted to the final arbitration of the Secretary of the Navy, should have refused to refer the dispute to that officer, refused to have furnished the sandstone required by the chief of the Bureau of Yards and Docks, and brought their action against the United States for damages for breach of the contract. If this had been done at this stage of the controversy, doubtless the court could have entertained the suit and have passed upon the contractors' rights by construing this contract and determined whether the sandstone selected by the engineer in charge must be received by the Government. But this the contractors did not do, but on the contrary proceeded with their rights under the contract, and submitted their case for decision to the Secretary of the Navy in strict conformity with the provisions of paragraph 14 of the contract. Whereupon that officer decided against the Tenino

sandstone and affirmed the decision of the Bureau of Yards and Docks, the court below finding (Finding VI, p. 42):

> From this decision of the Chief of the Bureau of Yards and Docks the claimants appealed to the Secretary of the Navy, who concurred in the opinion of the said Chief of the Bureau of Yards and Docks and concurred in his order requiring a different and better sandstone. The tests and analyses of said sandstone were made from samples furnished to the Bureau of Yards and Docks by the contractors and by the commandant of the Puget Sound station. The delay in arriving at the ultimate determination to require a better quality of sandstone, which was reached on the 24th of August, 1894, was partly caused by the fact that the claimants were in correspondence with the Secretary of the Navy in an endeavor to persuade him to accept said Tenino sandstone. The tests and analyses of said stone, as above recited, were made promptly.

The decision of this doubt or dispute, therefore, was made in strict accord with the provisions of paragraph 14 of the contract (Record, p. 21, 22), and it is submitted that the decision of the question by the Secretary of the Navy is final and conclusive upon the claimants as well as the Government; that it ousts the jurisdiction of every court over the original cause of action; that no suit can be brought upon the contract; that the only remedy of the claimants is by suit to set

aside the award of the Secretary of the Navy, and that if such suit is instituted the decision of the Secretary can not be avoided or set aside, except upon proof of actual fraud or such gross error as necessarily implies bad faith.

The foundation of the judgment of the court below was made to rest upon two grounds:

First because the court is of the opinion that the character of the stone to be used in the ashlar of this dry dock was not a "doubt or dispute" within the meaning of the fourteenth paragraph of the contract, for the reason that the question was not decided against them by the engineer in charge, but in their favor. In other words, the court holds that the only doubt or dispute which the parties agreed to submit to the arbitrament of the Secretary of the Navy is such doubt or dispute as arises between the engineer and the contractor.

In the first place, there is no language in paragraph 14 which warrants any such interpretation. If it had been the intention of the parties to have referred only such doubts or disputes to arbitration as might be initiated by the contractors and the engineer, the contract would have so provided. But it does not so provide, but on the contrary provides that "it is expressly understood, covenanted and agreed by and between the parties to this contract that if *any doubts or disputes as to the meaning or requirements of anything in this contract or if any discrepancy appears between the aforesaid plans and specifications and this contract the matter shall be*" etc

We have, then, an engineer who has accepted a sandstone which does not meet with the approval of the Bureau of Yards and Docks, under a contract which provides that this dry dock is to be built of material which shall be of the very best kind and quality adapted for the work (Transcript, p. 16), of approved material and in a thoroughly substantial and workmanlike manner to the satisfaction of the Chief of the Bureau of Yards and Docks (Transcript, p. 18, bottom, par. 8; specifications, p. 23, top), and which the Chief of the Bureau of Yards and Docks decides is an unsuitable and imperfect stone which does not fulfill the requirements of the specifications (Transcript, p. 30, bottom), and that it is neither clean nor hard, nor free from seams nor imperfections (Transcript, p. 41, bottom), and which he declines to receive for use in the ashlar of this dry dock. It might very well be argued, and the argument would seem to be conclusive, that inasmuch as the contractors had covenanted to construct this dock of material and workmanship of the very best kind and character and to the complete satisfaction of the Chief of the Bureau of Yards and Docks that the rejection by this officer of this imperfect sandstone and his disapproval thereof was binding upon the contractors and that they were compelled under their contract to furnish such material as would meet with the approval of the chief of the Bureau. But, however this may be, it certainly can not be contended that the issue concerning this sandstone was not a doubt or a dispute concerning something required by the contract or specifications which

was to be referred to the Secretary of the Navy for an ultimate and binding decision under the provisions of paragraph 14 of this contract, and the fact that the doubt or dispute did not originate with the engineer in charge is entirely immaterial.

In the second place, to put such a construction as this upon the provision of the specifications relating to the character of the ashlar to be used in this dock is to frustrate the whole spirit, purpose, and intent of this contract and these specifications, which is that the chief of the Bureau of Yards and Docks is to have the supervising power and control over the construction of this dock and is to decide all questions arising between the contractors and the Government, subject to a right of appeal to the Secretary of the Navy. The chief of the Bureau of Yards and Docks always has a supervisory power over the engineer, and the provisions of the contract and specifications which give him this supervisory power are of the utmost consequence to the Government to prevent anything in the nature of a fraudulent collusion between the engineer in charge and the contractor or to obviate the consequences of ignorance on the part of the engineer in charge and to prevent him through ignorance or otherwise from accepting any material which does not come up to the requirements of the specifications and which is imperfect and unsuitable for the construction of the dock. In a gigantic undertaking of this sort, involving the expenditure of millions of dollars, certainly there was no purpose on the part of the Government to leave the

selection of materials entirely to one engineer, who, by fraudulent collusion with the contractors or through ignorance or incapacity might destroy the whole completed structure by allowing defective and worthless material to be used in the process of its construction; and to avoid the possibility of this result the contract and specifications have amply safeguarded the interests of the Government by providing for the supervision and decision of all such questions by the Chief of the Bureau of Yards and Docks.

In the third place, the construction which we place upon this provision is the practical construction placed upon it by the parties themselves. When this doubt or dispute arose over this matter the claimants accepted the provisions of paragraph 14 as binding upon them and actually submitted this matter to the determination of the Secretary of the Navy; and it is thoroughly well settled that the practical construction placed upon a contract by the parties themselves and who perform their work and submit their rights in accordance to this construction is entitled to great weight, even if it is not binding upon the judiciary. (*Chicago* v. *Selden*, 9 Wall., 54.)

II.

The question concerning the quality of sandstone to be used in the ashlar of the dry dock having been actually submitted to the determination of an abitrator, pursuant to the provision of the contract requiring this to be done, and the arbitrator named in the contract having actually passed upon the question and made his award in conformity thereto,

his decision is binding and conclusive upon the appellees, ousting the jurisdiction of the court and rendering it impossible for the appellees to sue upon the original cause of action. The decision of the Secretary of the Navy, not having been impeached for actual or constructive fraud, will not be disturbed by the courts, but will be enforced as a finality.

The second ground on which the court below and the appellees in their brief seek to avoid the provisions of the fourteenth paragraph of the contract is that said provision is a mere agreement to submit all future disputes to arbitration, and hence is void on the grounds of public policy, and does not deprive the courts of their jurisdiction over an action upon the contract.

Assuming, *arguendo*, that the weight of the old authorities supports the doctrine that a *mere* agreement to submit all *future* disputes to the arbitration of *unnamed* persons will not, *unless followed by actual arbitration and award pursuant to such agreement*, oust the jurisdiction of the courts over suits upon the original cause of action and that such agreement, while *in fiere*, can not be enforced in equity by a bill for specific performance; yet it is likewise true, upon the same authorities as well as upon the universal and undissenting opinions of modern times:

(1) That if the parties to such agreement, prior to the institution of suit upon the original cause of action, actually do submit the dispute to arbitration, pursuant to the contractual agreement, and the arbitrator makes an award or decision upon the question thus submitted

(as was done in the case at bar), then such award or decision does oust the jurisdiction of the courts, no action at law nor suit in equity can be brought upon the original cause of action, and the award of the arbitrators can only be set aside in a direct proceeding for that purpose for fraud or such gross error as necessarily implies bad faith.

(2) That under a provision in a contract that any dispute arising thereunder shall be decided by a certain person, as a condition precedent, the parties can not resort to the courts in the absence of a decision by him or an offer by one and a refusal by the other to refer the dispute to his decision.

(3) That an agreement to submit all future disputes to arbitration is not void upon the ground of being contrary to public policy nor upon any other ground. The utmost limit to which the old authorities have ever gone is that such agreements will not oust the jurisdiction of the courts and will not be enforced in equity by suit for specific performance. But such agreements are not void, and the party refusing to arbitrate in accordance with such a contract is liable to the other party for all damages which he sustains by reason of this breach of contract.

(4) That the doctrine of the old authorities, founded as it was upon the jealousy of the common-law courts of their prerogative and the denial of the right of persons to settle their own disputes in their own way, is archaic, is totally unfounded either in reason or justice, and is hopelessly contrary to the spirit of

modern progress and the necessities of modern civilization. The doctrine will never be extended nor applied to any case unless the case is so identical with previously decided cases that the courts feel constrained, although against their will, to adopt the rule of *stare decisis*.

Of these in their order:

(1) It has already been shown, and is distinctly found by the court below as a fact (Finding VI, Record, pp. 41, 42), that the parties to this contract actually did submit to the Secretary of the Navy the doubt or dispute concerning the fitness and suitableness of Tenino sandstone for use in the ashlar of this dry dock, together with the question of whether the same came up to the requirements of the contract and specifications under and pursuant to and in strict accord with paragraph 14 of the contract; and that having been so submitted, the Secretary decided that said Tenino sandstone did not conform to the requirements of the contract and specifications in that the same was not a clean stone, nor a hard one, nor free from seams or imperfections; that the same was not of the best kind and character adapted to the work, and was totally unsuited for the use for which it was intended, and rendered a decision requiring the contractors to furnish other and better sandstone. The decision of the Secretary of the Navy, under the provisions of the contract, is binding and conclusive, and no suit will lie upon the original cause of action.

In Morse on Arbitration and Award (p. 91) the learned author, after laying down the general rule of

the old authorities to the effect that a simple agreement to refer all future disputes to unnamed arbitrators will not oust the jurisdiction of the court, says:

> But if, in pursuance of the agreement, the parties have proceeded to an arbitration, and an award has actually been made, it has precisely the same force as an award under ordinary circumstances, and the power of the courts to entertain a suit on the original contract is at an end.

The author cites *Haggart* v. *Morgan*, 5 N. Y. (1 Seld.), 422; *Miller* v. *The President, etc., of the Junction Canal Co.*, 53 Barb., 590.

The learned author might have cited many more cases, both old and new. Let us consider a few of these in their chronological order.

In 1746, in the King's Bench, it was determined in *Kill* v. *Hollister* (1 Wilson, 129) that, while a mere agreement of this sort will not oust the jurisdiction of the courts, an actual arbitration pursuant to such an agreement will do so, and prevent the possibility of an action being brought upon the original contract.

A like decision was rendered in 1793 by the lord chancellor in *Mitchell* v. *Harris* (2 Vesey, jr., 136).

In 1840, in the case of *Cleeforth* v. *Pickford* (7 Meeson & Welsby, 313, p. 320), Lord Arbinger, C. B., said:

> With respect to the last point made by Mr. Miller, it appears to be entirely a misapplication of the well-known rule of law that an agreement to refer is not binding. It is true that

> such an agreement is not binding unless it is acted upon, but when a reference has taken place and the award is made it becomes so. In one sense it does not oust the court of its jurisdiction, but in another sense it does; for when the award is made the jurisdiction of the court is gone; and all the courts have to say is whether the award is good or not.

In 1845 Mr. Justice Story, in *Tobey* v. *The County of Bristol et al.* (3 Story, 800, at p. 823), said:

> But where an award has been made before the revocation, it will be held obligatory, and the parties will not be allowed to revoke it, and the courts of law, as well as of equity, will enforce it.

In 1858 the celebrated Judge Moncure, delivering the unanimous opinion of the Virginia supreme court of appeals in *Condon* v. *The Railroad Co.* (14 Grattan, 302, at p. 317), said:

> But even if the agreement in this case came within the operation of the principle which prevents parties from ousting courts of law of their jurisdiction, it would not on that account be unlawful, but would only leave the parties at liberty to resort to the courts of law, as if no other mode of decision had been agreed upon by them. They would still be at liberty, at their election, to pursue the remedy agreed upon; and having pursued it to a decision, they would be bound and concluded thereby. Now, in this case the remedy agreed upon was pursued; the engineer made his final estimate, and

> the only complaint is that he made it erroneously. * * * Therefore, if the engineer did not exceed his authority in making the estimate it is final and conclusive; and that he did not has already been shown.

In that case the agreement between a railroad company and the contractor provided:

> And whereas the work must be inspected and received, it is hereby agreed that the engineer of the company, or some one appointed by him, shall be the inspector of said work; shall determine when this contract is complied with according to his judgment and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same; and his decision shall be obligatory and conclusive between the parties to this contract without further recourse of appeal.

It was held that the decision of the engineer was conclusive upon the parties, and that such contract was in all respects legal and binding. See to the same effect *Smith* v. *R. R. Co.* (36 N. H., 487), decided in 1858.

In 1881 Mr. Justice Staples, in delivering the opinion of the court in *Corbin* v. *Adams* (76 Va., 58, at p. 61), said:

> Such an agreement, not consummated by an award, is held to be no bar to a suit at law or equity; nor can it be the foundation of a decree for specific execution. In its very nature it must rest on the good faith and consent of the parties concerned. Parties litigant can not by

such arrangements oust the jurisdiction of the courts or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies. After the arbitrators have acted and rendered an award the case is very different. Their decision is binding upon the parties and can be successfully impeached only upon grounds which would invalidate any other judgment. This distinction between a mere agreement to submit and a submission consummated by an award is universally recognized by the authorities. (Morse on Arbitration, 79, 90.) One of the leading cases on the subject is that of *Tobey* v. *County of Bristol et al.* (3 Story, 822), where the whole subject is exhaustively considered and many decisions cited by Mr. Justice Story.

Decisions of like import might be multiplied almost without number but to no good purpose. Such is the universal doctrine of every court in every English-speaking nation of the world, and it is confidently submitted that not a single decision can be found to the contrary—except the decision of the Court of Claims in the case at bar.

(1a) The court below also seems to think that paragraph 14 of the contract at bar is illegal because the Secretary of the Navy, who is thereby made the arbitrator of doubts and disputes arising under the contract, is a party to the transaction, and that it is not lawful for people to contract to refer disputes to the decision of one of the parties to the transaction, and cites in support of its position a saying of Lord Coke,

wherein that learned commentator is charged with having said centuries ago that it becomes no man to be both judge and party in the same case. The court does not give its reference to this saying of Lord Coke's, and if it had it would have been found that his lordship's remark had reference to some other state of things than that of the free contractual act of the parties in selecting some person to arbitrate their own disputes. The parties are as free in this respect as the universal law of man's free agency, and the law does not undertake to restrict them in any manner whatsoever.

In Morse on Arbitration and Award (pp. 99 and 105) it is said:

> As a general statement it may be said that any person whomsoever may be chosen to fill the position of arbitrator. "Neither natural nor legal disabilities," says Russell, "hinder a person from being an arbitrator." And he adds that "it has indeed been laid down as law in works to which great respect is due that idiots, lunatics, infants, married women, persons attainted and excommunicated are disqualified for the office; but the better opinion is that they may be arbitrators; for every person is at liberty to choose whom he likes best for his judge, and he can not afterwards object to the manifest deficiencies of those whom he himself has selected" (p. 99).

At page 105 the learned author says:

> Even the rule that a party can not be judge in his own cause may be disregarded by par-

> ties in choosing an arbitrator. If two disputants agree that one of them shall finally determine the matter in issue, his award will be good, although it be in his own favor. (Citing many cases.)

In *Monongehela Navigation Company* v. *Fenlon* (4 Watts & Seargeant) it was held by the supreme court of Pennsylvania that if the parties to an executory contract make a provision in it that any dispute which shall arise between them on the subject of the contract shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other; but they must resort to the tribunal appointed by themselves, from whose award there is no appeal. If parties by contract appoint an arbiter to settle their disputes they are bound by his award, although he may be interested in the contract which was the subject of reference.

In *Railroad* v. *McGrann* (33 Pa. St., 530, at p. 533) the agreement was that the chief engineer of the railroad company was to be the arbitrator of all disputes arising under the contract and that his decision should be final and conclusive. The court said:

> The inquiry relates solely to the contract of the parties. In stipulating as they did that the chief engineer should be the umpire between them, it may well be that it was supposed the engineer would better than others understand the merits of any controversy that might arise. But it was also well known that the engineer was an officer of the company, paid by them, and that he held his office at their pleasure.

> The purpose of the agreement of submission was therefore not alone to select the most competent arbitrator, but to intrust the decision of any dispute to one whose very position was one of dependency upon the company. We have nothing to do with the prudence of such an agreement. It is ours to enforce the contract as the parties have made it. A party litigant may refer to his adversary, if he will, or to anyone interested adversely to himself. Such a submission will be enforced. (Citing a number of cases.)

To the same effect see *Railroad Company* v. *Riley* (7 Colo., 494).

(2) Under a provision in a contract that any dispute arising thereunder shall be decided by a certain person as a condition precedent, the parties can not resort to the courts in the absence of a decision by him or an offer by one and a refusal by the other to refer the dispute to his decision. All the cases heretofore cited uphold this rule. In addition, see:

Monongahela Navigation Co. v. *Fenlon*, 4 Watts & S., 205.

Reynolds v. *Caldwell*, 51 Pa. St., 298.

R. R. v. *McGrann*, 33 Pa. St., 530.

Lauman v. *Young*, 31 Pa. St., 306.

Denver, etc., R. R. Co. v. *Riley*, 7 Colo., 494.

Denver & N. O. Co. v. *Stout*, 8 Colo., 61.

Union Pacific R. R. Co. v. *Anderson*, 11 Colo., 30.

Loup v. *California S. R. Co.*, 63 Cal., 101.

Cox v. *McLaurin*, 63 Cal., 196.

Fox v. *R. R. Co.*, 3 Wall. jr., 243.

The case of *Hurst* v. *Litchfield* (39 N. Y., 377), which is cited by the court below, is discredited in *Delaware and H. Canal Co.* v. *Pennsylvania Coal Co.* (50 N. Y., 250), and is said, in *Weeks* v. *Little* (15 Jones & S., 1), to be overruled by it.

(3) Even a mere agreement to submit all future disputes to unnamed arbitrators is in no sense of the word a void agreement, but is only unenforcible by a suit for specific performance. The parties are still at liberty to pursue the method of settlement prescribed by the agreement, and if one of the parties refuses to abide by such agreement he will be liable to the other for all damages which he may sustain by reason of such breach of the contract.

In Morse on Arbitration and Award (p. 90) it is said:

> The party refusing or rendering it impossible to abide by the agreement to refer is liable to the other for damages, to be recovered in an ordinary suit based on the breach of the contract. But this is the only remedy of the injured party.

See in accord all the authorities which we have cited (*supra*) on the other points, and see also 2 Am. and Eng. Ency. of Law, 2d ed., 573, and cases there collected. See also *Corbin* v. *Adams* (76 Va., 58, at p. 61).

(4) The doctrine of the old authorities, even in its narrow and limited application, founded as it was on the jealousy of the common law courts of their prerogative and a denial of the right of persons to settle their own disputes in their own way, is archaic, is unfounded in either reason or justice, and is hopelessly contrary

to the spirit of modern progress and the necessities of modern civilization. The doctrine will never be extended nor applied to any case unless the case is so identical with previously decided cases that the courts feel constrained, even against their will, to adopt the rule of *stare decisis*.

In the case of *Fox* v. *R. R. Co.* (3 Wall., Jr., 243, 245, 246), Judge Grier, while upon the circuit bench for the third circuit, and who afterwards became a distinguished member of this court, said:

> The rule appears to be: First, that a condition in a contract that the sum recoverable on a breach shall be ascertained by arbitrators before the parties shall sue either at law or at equity, is not such an agreement as will be treated as invalid, or as an attempt to oust the courts of their jurisdiction; and secondly, that it is even doubtful whether there is any sufficient foundation, either in policy or principle, for the ancient and hitherto undoubted doctrine that parties can not bind themselves by contract not to resort to the courts of law or equity. Lord Campbell stated thus emphatically his views of the main question in dispute: "There is an express undertaking that no action shall be brought until the arbitrators have decided. There is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there shall be some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract. Then, on on what ground is it to be declared illegal?

> It is contended that it is contrary to public policy. That is rather a dangerous ground to go upon. What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he should not be allowed to enter into such a contract." And his lordship subsequently traced, with much disapprobation, the origin of the opposite principle, which he attributed to the endless competition of the courts and their desire to absorb litigation into their respective jurisdictions. This obsolete dogma does not appear to have been received with approbation in Pennsylvania. * * * Such a clause in contracts like those constantly made by corporations for great public improvements is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of the courts of law and encourage litigation.

See the doctrine further criticised as standing on no solid reason by Coleridge, J., in *Scott* v. *Avery* (36 Eng. L. & Eq., 1).

In *Condon* v. *Railroad Co.* (14 Grattan, 302, at p. 316) the celebrated Judge Moncure, of the Virginia

supreme court of appeals, said, in delivering the opinion of the court:

> I am certainly not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private individuals.

And so in the case of the *Delaware and Hudson Canal Co.* v. *Pennsylvania Coal Co.* (50 N. Y., 251, at p. 258), Allen, J., in delivering the opinion of the court, says:

> Were the question *res novo*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstance entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in anywise obstructed or hindered the arbitration agreed upon. * * * The better way doubtless is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to

courts of law; and the rule is essentially modified and qualified.

It is in deference to this spirit of modern times and the necessities of modern civilization that it is now universally held that an agreement by members of a voluntary benefit association that the decisions of its tribunals concerning a claim to benefits shall be conclusive is not against public policy, and such agreements are universally upheld as valid, binding, and conclusive.

See *Hembeang* v. *Knights of Maccabees* (101 Mich., 161); *Woolsey* v. *O. F. Lodge No. 23* (61 Iowa, 492); *Anacostia Tribe O. of R. M.* v. *Marbach* (13 Md., 91).

We have not been able to find, after an exhaustive search through the decisions of this court, that this subject has ever been passed upon in this tribunal, except in the case of the *Excelsior* (123 U. S., 40), wherein it was held that a mere verbal understanding that if the salvage company and the owner of the steamship did not agree upon the amount of salvage the same was to be determined by some unnamed arbitrator would not prevent the court from decreeing salvage, where such verbal agreement had between the captain of the salvaged ship and the captain of the wrecking crew had not been acted upon by the parties. In the absence therefore of any decisions by this court on this subject it is believed that this court, which is not bound by any precedent save that which is founded upon solid reason and justice, and wherein no former decision has persuasive effect except so far

as the soundness of the decision commends itself to the judicial mind, will cast itself aloof from the senseless and obsolete dogma of the common law and declare that the contracts of parties which are lawful in themselves and which are neither *mala prohibita* nor *mala in se* will be enforced by the courts according to their terms, and, recognizing the necessities of modern civilization, the law's delays and the crowded dockets of the courts, permit citizens to settle their own disputes in their own way.

Whatever view, however, the court may take upon this subject is immaterial for the necessities of the case at bar. The subject-matter of this dispute having been submitted by the parties to arbitration in strict accord with the provisions of the contract, and the arbitrator selected by the parties having rendered his decision in strict accord with the provisions of the contract, that decision can not now be impeached by either party except in a direct proceeding for that purpose and in such proceeding will not be annulled or set aside except upon satisfactory proof of actual fraud or such gross error as necessarily implies bad faith. To this effect are the unvaried decisions of this court. (*United States* v. *Gleason*, 175 U. S., 588, 602; *R. R. Co.* v. *March*, 114 U. S., 549; *Chicago, etc., R. R.* v. *Price*, 138 U. S., 185; *Kihlberg* v. *United States*, 97 U. S., 398.)

The case of *Burchell* v. *Marsh* (17 How., 344) was a bill in equity, filed for the purpose of having an award rendered by arbitrators set aside. It was held

that if the award be within the submission and contains the honest decision of the arbitrators, a court of equity will not set it aside for error either in law or of fact. Mr. Justice Grier, delivering the opinion of this court, said:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be the substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement not the end of litigation. "In order," says Lord Thurlow (*Knox* v. *Symmonds*, 1 Vesey, jr., 369), "to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he would have made a different award."
>
> Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of

> corrupt partiality, merely because their award is not such a one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

The case of *District of Columbia* v. *Bailey* (171 U. S., 161), which is relied upon by counsel for appellees, has no sort of application either to the facts or the principles involved in the case at bar. In that case this court decided that the Commissioners of the District of Columbia have no power to agree to a common-law submission of a claim against the District, and that any attempt to do so would be to exercise powers not vested in the Commissioners, and hence would be void *ab initio*, and being void, of course the decision of the arbitrator upon such an alleged submission would be also void and could not be enforced. In that case the court makes an exhaustive examination of the authorities to the effect that an agreement to submit is a contract, and that no person, municipality, or ministerial agent who lacks the power to contract can possibly agree to such a submission. The court then examines the various statutes relating to the District of Columbia and to the office of Commissioner of the District, and reaches the conclusion that the District Commissioners are merely administrative officers and that the whole sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States,

acting *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials.

No such considerations can arise in the case at bar, for the reason that the contract in question was made under and pursuant to a direct authority from the Congress, authorizing and directing the Secretary of the Navy to acquire a certain piece of land on Puget Sound, at Port Orchard, in the county of Kitsap, State of Washington, at such point as he may select * * * and to have constructed by contract, after public advertisement upon said land so selected for naval and commercial purposes, a dry dock of certain described dimensions. (Act of March 2, 1891, 26 Stat. L., p. 804.)

Pursuant to the authority thus vested the contract for the construction of the dry dock was made, embodying among other things this provision for the final settlement of disputes or doubts arising in the process of its construction. It was by no means a common-law agreement to submit an already existing dispute to the arbitration of a third person, and therefore does not in anywise fall within the ruling of this court in *District of Columbia* v. *Bailey* (*supra*). The legislative power given to the Secretary to contract for the construction of this dock necessarily delegates to that officer full power to draw a complete and binding contract between the contractors and the United States, and carries with it the inherent power of providing for the settlement of disputes and disagreements which

inevitably arise in the construction of public works of such great magnitude and expense. But aside from the specific authority thus vested in the Secretary of the Navy, he is amply clothed with such authority by the act of April 30, 1798, creating the Navy Department, as was expressly held by this court in *United States* v. *Corliss Steam Engine Co.* (91 U. S., 321).

It is therefore submitted that the amount for which judgment was entered upon Finding VII, to wit, the sum of $21,108.88, is clearly erroneous, and that the same should be reversed with instructions to dismiss. For the same reason it is submitted that the judgment of the court below in favor of the United States upon the facts found in Findings VIII and X is clearly correct and should be affirmed, for the reason that both of the issues involved in these two findings were submitted, the one before and the other after the work was done, to the decision of the Chief of the Bureau of Yards and Docks and by that officer decided in accordance with paragraph 14 of the contract. It does not appear from these findings that the claimants exercised their right of appeal to the Secretary of the Navy under Findings VIII and X, but that is entirely immaterial, since by said paragraph 14 of the contract the decision of the Bureau of Yards and Docks is made a finality unless, except, and until the contractors exercise the right there given to them of appeal to the Secretary of the Navy.

III.

ADDITIONAL REASONS WHY THE AMOUNT OF THE JUDGMENT OF THE COURT BELOW RENDERED UPON THE FACTS SET FORTH IN FINDING VII IS ERRONEOUS.

In Finding VII the court rendered judgment against the United States for the difference between the cost of the Sucia Island and the Dog Fish Point sandstone and what would have been the cost of the Tenino sandstone if the same had been accepted and they had been allowed to complete the ashlar with said latter sandstone. The court finds that the total cost of said Sucia Island and Dog Fish Point sandstone was $33,556.23, and that the total cost of Tenino sandstone would have been $17,948.80, and the court proceeds to render judgment against the United States for the difference between these sums, to wit, the sum of $15,607.43. This judgment of course necessarily includes the total cost of all of the Sucia Island and Dog Fish Point and likewise the total cost of all of the Tenino sandstone that would have been necessary for the construction of the ashlar, and the difference between these sums is necessarily the total difference between the cost of all of the sandstone required for this purpose. And yet the court proceeds to render an additional judgment against the United States in the sum of $5,494.45 for certain Tenino sandstone, some of which was delivered at the dry dock and some of which remained at the quarry. Manifestly the cost of this Tenino sandstone either has been or should have been included in the total cost of the

Tenino sandstone necessary to construct the ashlar. If it has been so included and is embraced in the $17,948.80, which the court says would have been the total cost of all Tenino sandstone, then it is manifest that in rendering judgment for it again the court has duplicated this part of the judgment. If, on the other hand, this sum has not been included in the total cost of Tenino sandstone, then it is manifest that it should have been in order to arrive at the difference between the cost of the two varieties of sandstone, and that the total cost of Tenino sandstone, instead of being placed at $17,948.80, should have been that sum plus $5,494.45, making a total of $23,443.25. From the total amount of the cost of the other grade of sandstone, therefore, should have been deducted the total amount of the cost of all Tenino sandstone, making a difference of $10,112.98. It is perfectly manifest, therefore, that if the total cost of Tenino sandstone is $17,948.80 and the total cost of the other grade of sandstone was $33,556.23, that the total judgment in this finding should have been $15,607.43 instead of $21,108.88. On the other hand, if, in the total cost of Tenino sandstone, as stated by the court, they have not included the value of the sandstone quarried, then the value of that Tenino sandstone should be added to the cost of all sandstone which they would have been required to quarry in the future, and the total cost of all Tenino sandstone should be $23,443.25, which, being subtracted from $33,556.23, makes a difference of $10,112.98, which should have been the total judgment of the court under this finding.

In addition to this manifest error, it is further submitted that the facts set forth in Finding VII, taken in connection with the contract between the claimants in this case and the Tenino Stone Company, as set forth on page 36 of the transcript, utterly fail to support the judgment for $5,494.45, which the court rendered against the United States for certain Tenino sandstone, some of which was quarried and delivered at the dock and some of which was quarried but not delivered. The court finds in Finding VII that "this sum has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against said claimants for said sum of money." This money, therefore, does not represent any actual outlay on the part of the claimants, and manifestly if they are permitted to recover from the United States in this action they could only do so as trustees for the benefit of the Tenino stone quarry. Turning now to the contract between the Tenino stone quarry and the claimants (Rec., p. 36), it will be observed that the claimants were to pay nothing for this stone unless, except, and until said stone was accepted and approved by the United States, and that even when so accepted and approved, and even when actually used, was not to be paid for until the claimants had received their pay from the United States. There was, therefore, no liability on the part of these claimants to pay for any sandstone which in fact was not accepted and paid for by the United States, and inasmuch as none of this

stone was accepted or paid for by the United States, but on the contrary was repudiated and refused, it follows that under this contract between the claimants and the Tenino Stone Company no cause of action exists in favor of the stone company against the claimants, and inasmuch as the claimants have not actually paid, and never can be made to pay for this stone, no judgment in favor of the claimants can be rendered therefor against the United States. The court below and the counsel for the appellees urged that this subcontract can not be interposed as a defense against this claim, founding their contention upon *Masterson* v. *The Mayor* (7 Hill, 61). But there is nothing in that case either in fact or principle which affects the matter here. The fact remains that the claimants have not expended one dollar for this stone and are under no legal obligation whatever to pay for it.

In *United States* v. *Smith* (94 U. S., 214, 218) this court said:

> The United States can only be required to make compensation to the contractor for damages which he has actually sustained by their default in the execution of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States.

In any event it is therefore submitted that this $5,494.45 should be deducted from the total judgment rendered upon Finding VII and the amount of that judgment reduced accordingly.

IV.

CONCRETE TOE TO PROTECT SHEET PILING.

The facts concerning this item are set forth in Finding IX (Transcript, p. 43).

The expression "Navy Department" in this finding is not very clear. But whether the work here described was ordered by the Chief of the Bureau of Yards and Docks or by the Secretary of the Navy, the work was ordered to be done, not as extra or additional work, but as something necessary and proper to be done in order to secure a dock "constructed of approved materials and in a thoroughly substantial and workmanlike manner to the satisfaction of the Chief of Bureau of Yards and Docks" (see contract, par. 8, Transcript, p. 18), and in compliance with the specific requirements of the specifications (Transcript, p. 31), and in accord with the contractual stipulation enabling the Secretary to settle "all doubts or disputes as to the meaning or requirements of anything in this contract" (contract, par. 14, Transcript, pp. 21 and 22).

It needs no argument to show that if the sheet piling and timber work described in this finding were not protected by concrete or some other device from the teredo, the inroads of these insects, which are so numerous and destructive on the Pacific coast, would soon have destroyed the foundation upon which the superstructure of the discharge culvert was built, and that the whole structure would have soon come to grief. The encasing of this work in concrete was plainly required in order to meet the contractual re-

quirements that the dock and its accessories should be constructed in a thoroughly substantial and workmanlike manner. The plans for this dock do not accompany the findings, and in their absence it is impossible to determine whether this concrete toe was delineated upon said plans or not. But this is entirely immaterial, inasmuch as the contract and specifications in numerous places most minutely and emphatically require that anything and everything shall be done which is necessary to be done in order to secure a thoroughly substantial and workmanlike structure, whether the same is shown upon the plans or not. (See Transcript, pp. 18, 23, and 24.)

The allowance of extra pay for the work described in Finding IX is clearly erroneous.

V.

EXPENSE OF EXPERIMENTS WITH WATER-JET SYSTEM OF PILE DRIVING UNDER VERBAL DIRECTION OF THE SECRETARY OF THE NAVY.

This item is embraced in Finding XI (Rec., p. 44), and amounts to the sum of $1,156.76.

During the progress of the work the soil at the bottom of the dock proved to be of a tenacious and unyielding character, difficult of penetration by the ordinary drop-hammer system. On the 15th of February, 1894, it was stated that the round piles which were then being driven penetrated to a depth of from 8 to 10 feet. It was stated by the Bureau of Yards and Docks, in answer to this statement, that while round piles penetrating 8 to 10 feet might be satisfactory, dependent

upon the resistance shown by the first blow, yet the Bureau thought that these piles should be driven to a depth of 15 feet below the bottom of the excavation, if possible. A copy of this letter was furnished to the contractors, but when the report for piles driven in February was received it was found that the average of 76 piles driven on the 15th of February was but 5 feet 0.77 inch, none going to 8 feet; and of the 51 piles driven on the 16th the average was 5 feet 0.64 inch, none going to 8 feet; and the average depth of the 891 piles driven in February was only 6 feet 0.82 inch. The general average for February was much reduced by the piles driven in the latter part of the month, after the attention of the contractors had been called to the unsatisfactory depth reached by the piles. This report called forth from the Bureau other letters in March and April, urging that the piles be driven to a greater depth and reiterating the instructions contained in the Bureau's letter of February 27. There was no claim made at this time by the contractors that they could not reach a greater depth than that hitherto reported. Thereupon the Bureau telegraphed definite instructions on the 13th of April to accept no piles driven to a less depth than 15 feet. The contractors made no attempt to show that they could not drive piles to that depth or to a greater depth than had been obtained, but employed experts to give an opinon after tests upon the piles driven to show that the Bureau was wrong. On the 21st of May, 1894, while the Secretary of the Navy was on a visit to said dry dock

he verbally authorized the contractors to sink the piles by the method known as the water-jet system; that is to say, by forcing water into the ground by means of a sink pipe operated hydraulically, thus forming a hole into which the pile was set. Against the protest of the contractors this method was employed for a short time, resulting in the disintegration to some extent of the bottom of the pit. Thereupon, and by direction of the Secretary of the Navy, a board of civil engineers was convened to pass upon the feasibility of driving the piles by the water-jet system. They recommended against it, and the remaining piles were driven by the drop-hammer process as heretofore, and reached an average depth of 10 feet 4 inches. The aforesaid board of civil engineers also, by direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary directing them to sink said piles by the water-jet system, and recommended an allowance to said contractors therefor in the sum of $1,156.76. This amount was approved by the Secretary of the Navy and a voucher therefor drawn, but when the same came before the Auditor for the Navy Department for audit and before the Comptroller of the Treasury for payment, it was refused upon the ground that the same was not extra and additional but required and contemplated by the contract, and upon the further ground that the Secretary of the Navy had no authority in law to order the work done or to bind the United States for its payment.

The question presented by the facts concerning this item is purely one of authority. It is submitted that the Secretary of the Navy had no authority to order the foundation piles in the bottom of this dock to be driven by the water-jet system in violation of the plain provisions of the specifications requiring the same to be driven by the drop-hammer process until a satisfactory depth has been reached and the penetration is not more than one-fourth of an inch under the last blow of a hammer weighing 3,000 pounds falling 25 feet, or the equivalent thereof (Transcript, p. 28), unless, except, and until, as is further provided in the specifications (Transcript, p. 26, bottom), and in the seventh paragraph of the contract (Transcript, p. 18), the contemplated change shall have been determined upon by a board of naval officers appointed for that purpose, and the amount of the increased compensation fixed and agreed upon. It is also submitted that the Secretary of the Navy was inhibited from incurring this expense by the positive provisions of statutory enactments. Of these in their order.

1. Not only does the contract inhibit any change from being made in the plans and specifications in any respect, except upon the written order of the Bureau of Yards and Docks, and that if at any time it is desired to make such change the modification or change must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the nature thereof and the increased or diminished compensation resulting

therefrom, and providing that whenever such change shall either increase or diminish the cost of the dock by the sum of $500 the actual cost thereof shall be determined by a board of naval officers appointed for the purpose before the work is done, and that the contractors shall be bound by the determination of such board as to such increased or diminished compensation, but it also provides that—

> No further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part.

This provision of the contract is squarely within the principle laid down by all the authorities cited in the first division of this brief, that it is entirely competent for the parties by their contract to make the decision of any person or persons a condition precedent to the right of action upon the contract. In that case such decision is a part of the cause of action. Until the decision is made and the cause of action thus becomes complete, the courts have no jurisdiction of the case, and therefore can not be said to be ousted of their jurisdiction by the contract. They can only be said to be ousted when an independent cause of action exists, or will exist, which is itself referred to the decision of the arbitrators. This principle is commonly applied to building contracts and the like, in which it is stipulated that compensation for the work is not to be paid until

the work has been accepted and the amount of compensation ascertained by an architect, engineer, or other referee. (*Condon* v. *South Side R. R. Co.*, 14 Grattan (Va.), 302, 314; *Scott* v. *Avery*, 36 Eng. L. & E., 1.)

In Morse on Arbitration and Award (p. 93) it is said:

> But if the parties agree substantially to make the reference a condition precedent or necessary preliminary to the institution of a suit, then the reference must be carried out. Thus, if in a building contract it should be provided that the architect's certificate of the value of any extra work should be obtained as a condition precedent to the right to bring an action for such value, then the certificate would have to be procured before suit could be maintained. Or the stipulation may be to pay so much as a third person shall determine to be just; or it may be that work shall be done or materials furnished to the satisfaction or acceptance of a third person; or that the price to be paid shall be dependent upon his decision as to the quantity, quality, or price of the material or workmanship. In each of these cases the action of the third person must take place before the right to sue can mature. (Citing a number of cases)

See in accord all the cases cited in Division I of this brief.

Now, in the case at bar it had been expressly contracted that no payment whatever was to be made for any extra work or materials which departed from the

plans and specifications unless the agreement had been reduced to writing and signed before the obligation arising from such change or modification had been incurred, and then only to pay such sum as shall have been determined by a board of naval officers appointed for that purpose, the contractors and the Government to be alike bound by the determination of such board or the majority thereof. Manifestly this contract makes it a condition precedent that such agreement should be reduced to writing before the obligation is incurred, and also that the price of such extra work shall be determined by this board of naval officers before any right whatsoever is given to the contractors to sue upon this obligation. It is a part of the cause of action itself, and unless the requirements of this clause of the contract are fulfilled then no cause of action can possibly arise under it, and the courts are without jurisdiction to entertain an action upon it.

If it be contended that the Government is given the advantage in such contract, the complete answer is, *Such is the contract.*

In the case of the *Hudson Canal Company* v. *The Pennsylvania Coal Company* (8 Wall., 276), it was held that—

> In the case of a contract drawn technically and in form and with obvious attention to details, a covenant can not be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the nonimplication of

> it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance the advantages thus preponderating.

These doctrines are upheld by this court in the late case of *The Sun Pub. Co.* v. *Moore*, No. 49 of the present term, decided January 13, 1902.

It is idle to talk of an implied contract arising out of this transaction and to prate of the claimants being entitled to compensation upon a *quantum meruit*, for the reason that the written contract was in no wise abrogated, but remained at all times in full force and effect, and manifestly an express contract and an implied contract can not exist concerning the same transaction at the same time.

In *Hawkins case* (96 U. S., 689, 696, 697, 698) this question was elaborately examined, and upon this point the court said:

> Express stipulations can not be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence the rule is that if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done or for money paid must declare upon the written agreement so long as the special agreement remains in force and

> unrescinded, as he can not under such circumstances recover upon a *quantum meruit*. (Citing a number of cases.)

It can not be contended in this case that this provision of the written contract was rescinded by consent of the parties or abrogated by mutual consent. The Secretary of the Navy was not a party to this contract, did not sign it, and had no authority to change its terms. The clause of the contract under consideration expressly provides that the agreement for the change or modification in the plans must be accepted and approved by the chief of the Bureau of Yards and Docks, who is the party of the second part to this instrument, and who alone had any authority to authorize or accept any changes or modifications in the contract, plans, or specifications.

And herein is the fallacy of counsel for the claimants in applying the case of *Ford* v. *United States* (17 C. Cls. R., p. 60) to the case at bar in an effort to show that the principals may so act as to waive the provisions of a written contract. In Ford's case the person who ordered the extra work was the person who signed the contract and who was the party of the second part, but the court expressly say that if the work had been ordered by any officer other than the one signing the contract the decision would have been different. On page 78 the court say:

> If the contract in this case had been made by the Chief of Engineers, the extra work ordered by the engineer in charge would have been

> without authority and at the risk of the contractors, and the case would have been like that of *Hawkins* (*supra*). Or if the extra work, instead of having been ordered by the officer who made the contract, had been ordered by the local assistant engineer who supervised the work, it would have been an order prohibited by the contract, and the case would have been like that of *Braden & Angus*. (16 C. Cls R., 389.) But here Major McFarland had the same authority to order the extra work that he had to make the original contract.

So in the case at bar, if this departure from the plans and specifications had been ordered by the Chief of the Bureau of Yards and Docks, there might have been some room to contend that the provisions of the written contract had been waived by an officer clothed with that authority, to wit, by the principals. But such is not the case, and the Secretary of the Navy had no more authority to waive the provisions of this contract than did the humblest laborer employed upon the work.

(2) But not only is the Secretary of the Navy inhibited from incurring such an obligation by the specific provisions of the contract itself, but he is likewise commanded not do so by the provisions of statute law. By section 3679 of the Revised Statutes it is provided that—

> No department of the Government shall expend in any one fiscal year any sum in excess of the appropriations made by Congress for that fiscal year, or involve the Government in

any contract for the payment of moneys in excess of such appropriations.

Section 3732, Revised Statutes, provides:

> No contract or purchase on behalf of the United States shall be made unless the same is authorized by law and under an appropriation adequate to its fulfillment.

Section 3733, Revised Statutes, is as follows:

> No contract shall be entered into for the erection, repair, or furnishing of any public building or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for that specific purpose.

Section 3744, Revised Statutes, requires the Secretary of the Navy to cause all contracts made by his Department to be reduced to writing and signed by the contracting parties with their names at the end thereof. This last act has been held to be a statute of frauds as clearly as that of 29 Car. II, and contracts not made in conformity with its provisions are absolutely void. (*Clark* v. *United States*, 95 U. S., 541; *South Boston Iron Works* v. *United States*, 118 U. S., 37, 42; *Chap. of Calvary Cathedral*, 29 C. Cls. R., 269.)

The limitations imposed upon the authority of the Secretary of the Navy to bind the Government for the payment of money must at all times be known to and considered by the claimants, and it is incumbent upon them to know that no officer of the Government has authority to bind the Government for the payment of money except in strict and literal accord

with the permission given by statute. It is a favorite fallacy to assert that the Government is bound by its contractual obligations as are private persons, thereby seeking to show that whenever a resultant benefit occurs to the United States there arises in consequence thereof an obligation to pay for the benefit thus received. Nothing could be further from the truth, and the error of the conclusion consists in the falsity of the premises upon which it is based. Viewed in the strict application of contract law, it is true in many, if not all, particulars that the Government is bound by its contracts as are individuals, and that the same principles which are determinative of individual contractual rights are to be applied to the contracts of the Government; but, like every other general allegation, this statement of a principle, while it contains a broad foundation of truth, carries with it a trenchant disregard of accuracy in detail, the result of which is to rob the statement of its potency. In this case the insurmountable obstacle in the way of the application of such a principle is the total disregard which it has of the law of agency. It may be that after a contract is duly and properly and regularly made in strict accord with the provisions of law its interpretation will be governed by the same principles as are applied to private parties, yet it by no means follows that the same acts which would make a contract or incur an obligation for the payment of money between individuals will have a like effect between the individual and the Government; and this is because of the difference

between the authority of an agent to represent a private person and the authority of a public officer to represent the Government. The agent of a private person has authority to bind his principal for whatever he may do and whatever promises he may make so long as he acts within the general scope of his employment; and hence if the Secretary of the Navy had been acting as the agent of a private individual and within the scope of his general employment in and about the representation of that individual in the construction of this dry dock and had authorized the sinking of these piles by water-jet system and promised to pay for it, his principal would probably have been bound by such order and such promise. But the law of agency is very different with a public officer. A public officer is limited in the exercise of his capacity as an agent of the Government by the positive commands of statute law, and can only bind the Government when he has express authority to do the very identical thing and to make the very identical promise which he did do or did make. In the one case the authority is inclusive, and in the other it is exclusive. This distinction is nowhere better stated than by Mr. Justice Clifford, in the case of *Whiteside v. United States* (93 U. S., at pp. 256, 257), wherein for the full court he said:

> Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and

declarations of their agents, even where an act or declaration was done or made without any authority if it appear that the act was done or declaration made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority or that he had been held out as having authority to do the act or was employed in his capacity as a public agent to do the act or make the declaration for the government. Although a private agent acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistake of public officers or agents than to adopt the rule which, through improper combinations or collusions, might be turned to the detriment and injury of the public. Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

See in accord, Story on Agency, 6th ed., 307a; *Lee* v. *Monroe* (7 Cranch, 376); *Mayor* v. *Eschback* (17 Md., 282); *State* v. *Hayes* (52 Mo., 578); *Delafield* v. *The State* (26 Wend., 238); *Mayor* v. *Reynolds* (20 Md., 10).

It was early settled that the promises of a Cabinet officer or any other agent of the Government to pay

money or to obligate the Government for the payment of money, if made without authority of law, is absolutely void. (*Stansbury*, 8 Wall., 33.) In this case the Secretary of the Interior employed one Stansbury, who was a clerk in that Department, to represent the Government at the London Crystal Palace Exposition, and agreed to pay him therefor, in addition to his salary as a clerk in the Interior Department, a certain sum of money. There was, however, a statute upon the books which inhibited an officer of the Government from paying additional compensation to a person in its employ under regular salary, and upon the suit of Stansbury for the recovery of the amount promised him by the Secretary of the Interior it was held in the Court of Claims and affirmed in this court that the promise of the Secretary being in violation of this statute was a complete nullity and that no recovery could be had. So in the recent case of *Garlinger* v. *United States* (169 U. S., 316), a statute provided for the payment of night inspectors at $3 per day, and it was held that the Secretary of the Treasury had no authority by regulation or otherwise to divide up a day into two or more parts or to resort to any device whereby the compensation of such inspector could be increased to more than $3 for any one calendar day.

The Government does not guarantee the capacity, fidelity, or integrity of its officers or agents, and all persons dealing with them must know at their peril the extent to which they have authority to bind the Government, and their ignorance on this subject can not

increase the Government's risk. (See *United States* v. *Beebe*, 180 U. S., 343, 354; *Dox* v. *Postmaster-General*, 1 Pet., 318, 325; *McElrath* v. *United States*, 12 C. Cls. R., 201, 216, affirmed upon appeal in 102 U. S., 426, cited with approval in *United States* v. *Wisconsin R. R. Co.*, 164 U. S., at p. 207; *Hume* v. *United States*, 132 U. S., 406; *Moffatt* v. *United States*, 112 U. S., 24, 31; *Steele* v. *United States*, 113 U. S., 129; *United States* v. *Barlow*, 132 U. S., 271.)

It will be readily seen to what dire results we should come if the doctrine were to obtain that a Cabinet officer or any other official of the United States could, in violation and disregard of the statutes, employ persons for the erection of buildings or the performance of public works at his pleasure, and then by accepting the benefit of the same raise an obligation for the payment thereof which could be enforced by judgments in the Court of Claims. The result would be that the Government might be plunged in debt. There would be no necessity for a Congress to make appropriations and it would be impossible to tell at any given time what the obligations of the Government would be.

However much, therefore, our natural inclinations might lead us to sympathy with the claimants in this item, it is impossible that a judgment could be had for it because of the utter lack of authority on the part of him who contracted the debt. The only recourse that the claimants have is by an appeal to the Congress, which has the power to reimburse the claimants for these expenditures.

VI.

DAMAGES FOR DELAYS INCIDENT TO THE EXPERIMENTATION WITH THE WATER-JET SYSTEM.

This item is set forth in Finding XII, and is founded upon the delay in the construction and completion of the dry dock brought about by the experimentation with the water-jet system of driving the piles, as is detailed in Finding XI. The court below found that the delay in the construction and completion of the dock by reason of this cause amounted to a period of seventy days, exclusive of Sundays, for which they gave the claimants judgment in the sum of $2,625.

What has just been said under Division V of this brief is equally applicable to this item, with the added reason that the Secretary of the Navy never recognized this matter of delay as an element of cost, expense, or damage to the claimants. He did not recommend any payment for it nor did he procure its reference to the Court of Claims under the provisions of section 1063 of the Revised Statutes, as he did the question of expense concerning this matter as set forth in Finding XI. This claim evidently did not meet with his approval and does not have his sanction. It is expressly provided in the contract that all delays caused by the Navy Department or authority by any officer or agent of the Navy Department which shall operate as a delay upon the final completion of the dry dock shall entitle the contractors to a corresponding extension of time for the completion of the same. These delays therefore, if any, are not to entitle the claimants to additional or

further compensation, but merely entitle them to additional time for the completion of the structure. The case in this respect is identical with that of *Garlinger* v. *United States* (169 U. S., 316). In that case there was a regulation of the Treasury Department providing that night watchmen should be divided into two watches as nearly as possible, both watches to perform duty every night, and empowering the surveyor of the port to make such changes in the division of the watches as he may deem expedient, and to appoint the hours of duty for different watches, and that when it was necessary to assign a night watchman to a vessel or to any other all-night charge, the night watchman so assigned must remain on the vessel or on his charge until relieved, but would be excused from performing any duty the following night. The claimant in the case was required to serve upon all-night charges and was not excused upon the following night. He brought suit in the Court of Claims, claiming additional compensation for this additional work. But this court held that no such construction could be placed upon the regulation in question, the court through Mr. Justice Shiras saying:

> Nor do we think that such a construction can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches. In such a case the provision is that he will be excused from performing any duty the following night. This express provision negatives the inference that if he serves an all-night watch he will be entitled

> to double pay, and it certainly does not afford a ground on which to base an implied contract for full pay for both watches.

So in the case at bar it is expressly provided that any delays caused by the Navy Department shall entitle the claimants to a corresponding extension of time within which to complete the dry dock. This express provision negatives any implication that the claimants are to be entitled to extra pay by reason of such delay, and it certainly does not afford sufficient ground upon which to base an implied contract to pay damages for such delay.

The statement in Finding XII that the board recommended that the claimants were "equitably entitled" to some damages for delay is entirely unavailing, since it is not shown that this board was given any power to express any opinion upon such question. In Finding XI (Transcript, p. 45) it is stated that this board "was convened for the purpose of reporting upon the advisability of sinking the piles by the water-jet system" The finding then goes on to state that the board met, examined this question, and reported adversely upon it, and states further: "The aforesaid board of naval experts, under the direction of the Secretary of the Navy, passed upon the expense to which the contractors had been put on account of this verbal order of the Secretary of the Navy." It will thus be seen that there is absolutely nothing in the findings which for a moment suggests that the question of damages resulting to the contractors on account of any delay caused

by this order of the Secretary of the Navy was ever submitted to this board of experts for determination. They only passed upon the actual cost incurred by the contractors in obeying this order.

In this item, and in the item set out in Finding XI, we are not asking the court to transmute a contract into a statute of frauds, as is argued by counsel, but only that the courts enforce a lawful contract according to its terms, enforce it as the parties to it have drawn it, not to rewrite it under the guise of interpretation. We plead for the sanctity of contracts. "If the contract as written did not express the intention of the parties, it was the claimants' folly to have signed it." (*Brawley* v. *United States*, 96 U. S., at p. 173, quoted with approval in *Simpson* v. *United States*, 172 U. S., at p. 379.)

In speaking of the act of 1862 (12 Stats., 411, now Revised Statutes, section 3744) this court, in *Clark* v. *United States* (95 U. S., at p. 542), said:

> The Court of Claims has heretofore held this act to be mandatory and as requiring all contracts made with the Departments to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. The facility with which the Government may be pillaged by the presentment of claims of the most extraordinary character if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Govern-

ment must be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writings signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. *A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law.* We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

It is true that the court adds at the conclusion of this the following:

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value

of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

If it be conceded that this doctrine has application to a parole modification of a written contract by the consent of the parties, yet it could have no application unless such parole modification was made or assented to by the parties making the contract. In the case at bar the parole modification sued upon was not made by the Chief of the Bureau of Yards and Docks, but by the Secretary of the Navy. The Secretary of the Navy is not a party to this contract and had no more authority to depart from its terms by parole agreement than the merest stranger. His authority to do so, and consequently the voidness of his promise, is as great as was that of the Secretary of the Interior in the case of Stansbury (8 Wall., 33) or the engineer in charge in the case of Hawkins (96 U. S., 689).

VII.

BYRON BARLOW & CO., APPELLANTS,
v.
THE UNITED STATES, APPELLEES. } No. 128.

AS TO THE ITEMS DISALLOWED BY THE COURT BELOW IN FINDINGS VIII AND X.

These items are as follows:

Finding VIII.

The plans for the foundations of the boilers and boiler house were submitted to the engineer in charge of the work and approved by him, and the work was then done on said foundations

in accordance with the directions of said engineer. The foundation for the boiler house was completed and accepted by said engineer and included in his monthly estimate and paid for. The foundations for the boilers were made in accordance with the drawings so submitted to said engineer, and were completely laid at about the time the engineer first in charge of said work was detached therefrom. Subsequently another engineer was placed in charge of the work. In his opinion the foundations were imperfect and insecure because of defective construction on the part of the claimants, and he required that they be relaid. The claimants, protesting that it was not competent to require them to change the foundations after they had laid the same to the acceptance of the engineer in charge at the time of the original construction, relaid the same in accordance with the direction of the engineer thus subsequently in charge. The matter was subsequently referred to the Chief of the Bureau of Yards and Docks, and he decided that the work was required to be done by the terms of the contract. It does not appear that the claimants appealed to the Chief of the Bureau before doing the work or that it was ordered by him.

Finding X.:

In refilling the dirt after the altars were in place no part of the filling was rammed or sluiced except the clay puddling. This was in accordance with the instructions of the engineer in charge of the work. The claimants discussed

the matter with him and he informed them that it was not required to be rammed or sluiced. He embraced the work done in that way in his monthly estimates and the claimants received payments for a large portion of the work done in that way and at the contract rate of 30 cents per cubic yard. In the latter part of August, 1894, however, there was a change in the office of engineer in charge of the work for the United States. The new engineer then placed in charge required the claimants to ram and sluice all back fillings. The claimants protested, insisting that the contract did not require anything more than depositing the material and evenly grading the surface to correspond with the grade of the station. The new engineer, however, required all the work to be thoroughly sluiced with water and all but a small part thoroughly rammed, and the claimants did the work in that way under protest. The additional cost to the claimants of doing this work over and above what would have been required had they not been required to ram or sluice the same, would be 10 cents a yard, making, for 37,227 yards, $3,722.70. The engineer who ordered the work to be done in the manner stated referred the question of so requiring it, at the request of the claimants, to the chief of the Bureau of Yards and Docks, and the latter informed said engineer that the Department approved his requirement, for the reason, as shown by the Bureau, that the contract plainly required it.

The disallowance of these items by the court below was plainly correct for many reasons.

1. They are "doubts or disputes as to the meaning or requirements of the contract," which were actually submitted to the decision of the chief of the Bureau of Yards and Docks in conformity to paragraph 14 of the contract (Transcript, pp. 21, 22), and concerning which that officer has made his award or decision. For the reasons and upon the authorities given in Division I of this brief the decision of the chief of the Bureau of Yards and Docks upon these questions was final and conclusive upon all the parties. It ousted the jurisdiction of the courts and no suit is maintainable upon the original cause of action. The claimants can not maintain an action for the damages here claimed for except by a suit to set aside the award of the arbitrators upon the ground of actual or constructive fraud. This has not been done, and no allegation of fraud or even mistake appears in the pleadings or in the findings the court.

It does not appear from the findings of the court below whether the contractors exercised the right of appeal to the Secretary of the Navy which is given to them by the fourteenth paragraph of the contract or not. But if they did not, it was no one's fault but their own. The contract makes the decision of the chief of the Bureau of Yards and Docks final and conclusive in the absence of an appeal to the Secretary of the Navy. If the claimants waived their right of appeal to that officer, then they must abide by the decision of the chief of the Bureau.

2. Because the work described in these two findings

was plainly required by the provisions of the contract and specifications (see Transcript, pp. 16, 18, 23, 24) requiring the work to be done of the most approved materials, in a thoroughly substantial and workmanlike manner and to the complete satisfaction of the Chief of the Bureau of Yards and Docks, whether the same was shown in detail upon the plans and specifications or not. The fact that this imperfect and worthless method of construction was approved by the engineer first in charge of this work was entirely unavailing to the contractors, for in the first paragraph of the contract it is expressly provided that said dock shall be constructed in accordance with the plans and specifications, "subject to the approval of the civil engineer or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually stipulated and agreed that the officer or officers, person or persons thus designated shall and may, from time to time during the progress of the work, inspect all material furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down by and at the expense of the contractors, and that all such rejected material shall be at once removed from the station and replaced by materials satisfactory to such inspectors, and that all such

inferior or unsafe work shall be replaced by satisfactory work by and at the expense of the contractors."

Under the provisions of this contract, therefore, if the Navy Department deemed Mr. White, the original engineer in charge of this work, not sufficiently skillful or not sufficiently possessed of technical knowledge to properly superintend the same and supplanted him by another engineer who, in the judgment of the Department, possessed superior skill, judgment, and ability, the contractors were obligated to take down work which the second engineer deemed defective or to replace materials which the second engineer deemed unsuitable. This work was not required of the claimants as extra or additional work, but was required of them as work plainly called for by the contract in order to supply a good and workmanlike job; and when the engineer found that the concrete masonry for the foundations of the boiler was settling inside of the boiler house, and that well-defined cracks had appeared near the northeast corner, and owing to the fact that the material behind the altar walls had not been rammed and sluiced, that said material was settling out of grade, it was plainly within his authority to require the claimants to alter this defective plan of construction so as to remedy these defects. It needs no expert knowledge for us to know that if the earth behind the altar walls of a great structure like a dry dock is not properly rammed or sluiced in course of time the earth will settle behind said walls, causing great pressure against them,

allowing the surface water to drain through and under the sides and bottoms and eventually disintegrate the walls to such an extent as to threaten their utter destruction.

3. Even if these claims could in any proper sense be regarded as extra work, recovery for them would be impossible under the provisions of the seventh paragraph of the contract (Transcript, p. 18), which provides that no omissions in the plans or specifications or of any detail necessary to carry this contract into full and complete effect shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby and in consideration of the premises expressly waived; and it is further provided and made the express condition of the contract that the plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks, and that if at any time it shall be found necessary to make any change or modifications in the plans or specifications, then it could only be done when the same had been agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the estimated actual cost thereof, which the contractors should receive, and under the further proviso that if such change should operate to increase or decrease the total cost of the dock by the sum of $500 then the actual

cost thereof should be determined by a board of naval officers appointed for that purpose as to the amount of increased or diminished compensation which the contractors were to receive, and further providing that no payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the Chief of the Bureau of Yards and Docks.

In this respect, therefore, the case is identical with the decisions of the Court of Claims in the cases of *Ferris* v. *United States* (28 C. Cls. R., 332) and *Simpson* v. *United States* (31 C. Cls. R., 217).

In the Ferris case the contract contained a provision similar to the one in the case at bar, and was a contract for the dredging of a channel of the Delaware River, and for the removal of the material thus dredged, which said material was advertised to be of sand, mud, and gravel, the advertisement and specifications being made a part of the contract, which provided that any change or modification which would increase or diminish the cost must be agreed upon in writing by the contracting parties and approved by the Secretary of War. Shortly after the beginning of the work the contractor ascertained that the material to be excavated from said river did not wholly consist of sand, mud, and gravel, as described in the advertisement for proposals and in the contract, but consisted in fact of sand, gravel, and bowlders, some of the latter weighing from 100 pounds to 3 tons, and amounting in all to over

30 per cent of the entire work, which thereby immensely increased the cost of doing the work. Upon making this discovery the contractor went to the engineer in charge, who referred him to the assistant engineer, who, upon the contractor representing that he must have extra pay or would quit the work, promised it to him and the contractor, relying upon this promise, went on and did the work and brought his suit to recover said extra compensation. The case was defended upon the ground that no such compensation could be paid unless, except and until supplementary agreements in writing had been made in accordance with the provisions of the contract, and the Court of Claims sustained this contention, reviewing all the authorities on this subject, and holding to the integrity of the written contract, saying:

> When it was ascertained by the claimant that the material contemplated by the contract was essentially different from the material to be dredged, it was his duty if he did not wish to proceed with the execution of the work to so notify the officer with whom he contracted and to get from him by the sanction of the proper parties such change as could be agreed upon.

In the *Simpson case* (*supra*) (which was affirmed by this court upon appeal, 172 U. S., 372) there was a contract for the construction of a dry dock at the navy-yard at Brooklyn, and the contract contained a provision precisely similar to that which is contained in the contract at bar. In that case the specifications provided that the contractors shall build a dock "upon an

available site to be provided by the Government." During the progress of the work it transpired that the site selected by the Government for this purpose contained large pockets of quicksand, so that the work was submerged almost as fast as done, and claim was made that there had been a breach of contract by the Government in its failure to provide an available site, and, *inter alia*, demand was made for the extra cost of the additional material and labor furnished in and about the reconstruction of the work which had been submerged by the action of the quicksand. Among other points the court decided that there could be no recovery thereon because the cost thereof had not been ascertained and the contract therefor reduced to writing, as required by the contract, and the court said that the case did not differ in principle from that of *Ferris* (*supra*), which it cites with approval.

See in accord, *Dale's case* (14 C. Cls. R., 533), *Kennedy's case* (24 C. Cls. R., 144), *Elridge* v. *Fur* (50 Mo. App., 144).

It is therefore submitted that the judgment of the court below, disallowing the claims set up in Findings VIII and X, should be affirmed, and that the judgment of the court below on all other items in the petition should be reversed with instructions to dismiss the petition.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANTS, *v.* BYRON BARLOW, JAMES E. BLACKWELL AND James M. Dugan, partners, as Byron Barlow & Co.	No. 127.
BYRON BARLOW, JAMES E. BLACKWELL AND James M. Dugan, partners, as Byron Barlow & Co., appellants, *v.* THE UNITED STATES.	No. 128.

ANSWER TO MOTION OF APPELLANTS FOR MODIFICATION OF JUDGMENT.

The motion in this case seeks a revision of the judgment and opinion of the court filed February 24, 1902, to the extent of having allowed to the appellants the sum of $3,967.60, being the amount found by the court below to be the value of the Tenino stone quarried but not delivered.

The decision of the court manifestly proceeded upon the theory that the engineer in charge could not by the acceptance of a sample accept the product of a stone quarry in advance for use in the ashlar of this

dock. The allowance of the value of the stone which was quarried and delivered upon the site of the dock was upon the theory that such stone had been actually inspected by Mr. White, the engineer, and by him actually accepted. There is no finding in the record whatever which supports the notion that the stone, which had been quarried but not delivered upon the site of the dry dock, had ever been actually seen or actually inspected or actually accepted by Mr. White. To allow any payment for it would be subversive of the fundamental principles involved in the decision of this case, for if his implied acceptance of this stone is to be binding upon the Government, then his implied acceptance of the total product of the quarry would be equally binding, and the result would be to subvert the principle of the decision, to wit, that no acceptance on the part of Mr. White was binding upon the Government until the actual stone to be used had been inspected and accepted, and that Mr. White could not accept the product of a stone quarry in advance.

In addition the attention of the court is further directed to page 36 of the transcript and to the statements contained in Finding VII (Transc., p. 42), wherein it is found that Messrs. Byron, Barlow & Co. have never paid any sum of money whatever to the owners of the Tenino stone quarry for this stone, and that no action or suit has ever been brought against them by the owners of said quarry. This money, therefore, does not represent any actual outlay on the

part of the claimants; and manifestly if they are permitted to recover from the United States in this action they could only do so as trustees for the benefit of the Tenino stone quarry.

Turning now to the contract between the Tenino stone quarry and the appellants (Rec., p. 36), it will be observed that the appellants were to pay nothing for this stone unless, except, and until said stone was accepted and approved by the United States, and that even when so accepted and approved, and even when actually used, was not to be paid for until the claimants had received their pay from the United States. There was, therefore, no liability on the part of the appellants to pay for any sandstone which in fact was not accepted and paid for by the United States; and inasmuch as none of this stone was accepted or paid for by the United States, but, on the contrary, was repudiated and refused, it follows that under this contract between the claimants and the Tenino Stone Company no cause of action exists in favor of the stone company against the appellants; and inasmuch as the claimants have never actually paid and never can be made to pay for this stone, no judgment in favor of the claimants can be rendered therefor against the United States.

Not only so, but there is nothing in this record to show as a matter of fact that this stone, which was quarried from the Tenino stone quarry a great number of years ago, has not actually been sold by the owners of the Tenino stone quarry to other persons and for

other purposes. The quality of this stone has been highly praised by the appellants and their counsel and their witnesses, and it is to be presumed, therefore, that it is a merchantable commodity, and if a merchantable commodity it has probably been sold by its owners long ere this for a price as great and perhaps greater than that which was to have been paid for it by the appellants.

It is submitted that the motion should be overruled.

GEORGE HINES GORMAN,

Special Attorney.

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